

**Memorandum of Decision: 04-20170197R**  
**Tax Administration**  
**For the Year 2016**

**NOTICE:** IC § 4-22-7-7 permits the publication of this document in the Indiana Register. The publication of this document provides the general public with information about the Indiana Department of Revenue's official position concerning a specific set of facts and issues. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Memorandum of Decision.

**HOLDING**

The Department agreed that out-of-state Employee Recognition Company was entitled to a refund of a ten-percent penalty because Employee Recognition Company's failure to remit sales tax was not willful; the Department did not agree that Employee Recognition Company was entitled to a refund of collection fees. Neither the Department nor its collection agent overstepped their authority or failed to fulfill their responsibility.

**ISSUE**

**I. Tax Administration - Penalty and Collection Fees.**

**Authority:** IC § 6-8.1-5-1(c); IC § 6-8.1-8-4; IC § 6-8.1-10-2.1(a)(2); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues that it is entitled to a refund of penalty and collection fees on the ground that because it was unaware that it had failed to timely remit sales tax.

**STATEMENT OF FACTS**

Taxpayer is an out-of-state company in the business of assisting employers in recognizing employee achievement. In doing so, it sells recognition prizes to employer customers in Indiana and other states.

Taxpayer collects sales tax from its Indiana employer customers. Taxpayer attempted to electronically file its April 2016 sales tax return. Taxpayer filed the return but failed to accompany the return with payment.

The Indiana Department of Revenue ("Department") took steps to collect the unpaid sales tax including obtaining the assistance from the Department's collection agent. Taxpayer paid the sales tax, paid a ten-percent penalty, and paid fees assessed by the collection agent.

Taxpayer submitted to the Department a claim for refund (GA-110L) of the penalty and collections fees. Taxpayer sought a refund of approximately \$11,000. The \$11,000 represented approximately \$3,500 in penalties and \$7,500 in collection fees.

The Department denied the refund claim in a letter dated January 2017. The letter stated that "[c]ollection fees are nonrefundable" and that Taxpayer had failed to respond to a liability notice sent Taxpayer.

Taxpayer disagreed with the Department's decision and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for this protest. This Memorandum of Decision results.

**I. Tax Administration - Penalty and Collection Fees.**

**DISCUSSION**

The issue is whether Taxpayer has established that it is entitled to a refund of either the penalty amount or the collection fees.

**A. Penalty.**

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the

taxpayer's negligence. IC § 6-8.1-10-2.1(a)(2) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to . . . pay the full amount of tax shown on the person's return . . . or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." Id.

Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed . . . ."

Under IC § 6-8.1-5-1(c), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment - including the negligence penalty - is presumptively valid.

Taxpayer states that its failure to pay the April 2016 sales tax was entirely inadvertent and that it took steps to pay the amount as soon as it was aware of the deficiency. Taxpayer explains:

When the return for May 2016 return was being prepared in mid-June, it was noticed that [the April] payment was still showing outstanding and included penalties and interest. A phone call was made to the sales tax department to verify that those monies had not been received. In order to clear up the liability, a payment of [approximately \$45,000] was paid on 6/21/16 without noticing the collection fee.

The Department believes that Taxpayer erred in failing to assure that its April 2016 liability was paid. However, there is insufficient information to establish that Taxpayer's error was so egregious as to constitute "willful neglect." Based on a "case-by-case" analysis and after reviewing "the facts and circumstances of [this] taxpayer" the Department agrees that the penalty should be abated.

## **B. Collection Fees.**

In addition, Taxpayer also argues it is entitled a refund of the \$7,500 in collections fees. The Department is entitled to employ the services of a collection agent which - in turn - is entitled to impose fees sufficient to compensate the collection agent for its own efforts. The statutory authority is found at IC § 6-8.1-8-4.

(a) When the department collects a judgment arising from a tax warrant, it may proceed in the same manner that any debt due the state is collected, except as provided in this chapter. The department may employ special counsel or contract with a collection agency for the collection of a delinquent tax plus interest, penalties, collection fees, sheriff's costs, clerk's costs, and reasonable fees established under subsection (b) if:

(1) an unsatisfied warrant has been issued by the department; or

(2) the department received a tax payment by check or other instrument drawn upon a financial institution, and the check or other instrument was not honored by that institution.

(b) The commissioner and the budget agency shall set the fee that the special counsel or collection agency will receive and payment of the fee shall be made after a claim for that fee has been approved by the department.

(c) The fees become due and owing by the taxpayer upon the filing of an amended warrant with the circuit court clerk adding the fee authorized by subsection (b) to the amount of the judgment lien under section 2 of this chapter.

Taxpayer argues that its failed attempt to pay the April 2016 sales tax liability was inadvertent, that it promptly took steps to correct the error, and the Department's liability notice was untimely. Taxpayer further explains that "[o]ur payment and tax filing record with the State of Indiana has been good . . . [and] we have been proactive in paying this charge . . . ."

The remaining issue is whether - as between the Department and Taxpayer - who should be responsible for paying the collection fees incurred by the Department's collection agent. The Department is unable to agree that it is the Department which should incur these fees or that the fee amount should be refunded to Taxpayer. There is

nothing to indicate that either the Department or its collection agent failed in any way to perform its responsibilities or overstepped their statutory authority. There is nothing to indicate that it was the Department or its agent's error which led to the efforts to collect the unpaid sales tax amount.

### **FINDING**

Taxpayer's protest is sustained in part and denied in part; Taxpayer is entitled to a refund of the penalty amount but is not entitled to a refund of the collection fees.

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